MAJOR KASSIM SHARIFF

v.

KWONG YIK FINANCE BHD

HIGH COURT MALAYA, IPOH
PS GILL J
[CIVIL APPEAL NO: 12-19-1999]
30 JANUARY 2001

HIRE PURCHASE: *Hire-purchase agreement - Stolen vehicle - Vehicle seized by police - Whether finance company had good title - When property passed - Sale of Goods Act 1957, s. 20 - Whether agreement used as device to cloak real transaction - Whether it was truly a loan upon security of goods - Whether agreement was manifestly void from its inception - Whether contaminated with turpis causa - Whether the entire hire-purchase agreement void*

This case revolves on a sale and purchase, cum hire-purchase agreement of a motor vehicle involving financing by a finance company. In the purchase of the vehicle, a sum of RM34,150 was paid to one Toon Ah Choy ("Toon") by a sale and purchase agreement and the remaining sum of RM 35,000 was financed by the finance company with whom the plaintiff entered into a hire-purchase agreement ("the agreement"). The action was brought by the plaintiff/customer who claimed that the said vehicle had been seized by the police as it was a stolen vehicle. The said Toon had been brought in as a third party in the proceedings but entered no appearance to it.

The learned sessions court judge had allowed the plaintiff's claim on the ground that since the finance company had no good title to give the plaintiff due to the fact that the said vehicle was stolen, there was a total failure of consideration. Further, it was held that there was a fundamental breach of the contract, pursuant to s. 66 Contracts Act 1950 and therefore the entire hire-purchase agreement was null and void. Hence, the finance company ("defendant") appealed against the decision of the sessions court.

Held:

[1] The question that fails to be resolved was when the property had passed. The rule expressed in s. 20 of the Sale of Goods Act 1957 was applicable in this instance. Accordingly, the said vehicle had passed from Toon to the plaintiff when the sale and purchase agreement was made. There was no evidence to show any sale by the plaintiff or from Toon to the finance company. The ownership in the vehicle therefore remained at all relevant times with the plaintiff.

[2] The fair inference to be drawn was that the plaintiff owed Toon a certain sum and the hire-purchase agreement was used as a device to cloak the real transaction which was a loan upon security of goods. In short, the hire purchase agreement was an unregistered bill of sale. Not being in its statutory form, it was non-registrable and was therefore manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated.

[3] The court must consider whether s. 66 of the Contracts Act 1950 could be applied. The principle was well illustrated by the case of *Kuju Collieries v. Jharkhand Mines*. A principal gleaned from that case is to the effect that a contract which is not in accordance with statutory requirements as in the present instance is no contract at all, and therefore cannot be said to have been discovered to be void and unenforceable by either party. It was contaminated by *turpis causa* and that the rule has long been established that *ex turpis causa oritur non action* – no person can claim any right or remedy whatsoever under an illegal transaction in which he had participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands.

[4] There was a paucity of evidence on this issue whether the parties were in *pari delicto* or not when the void agreement was entered. This was presumably because these aspects of the case were not satisfactorily presented and developed. It is not for this court at this juncture to infer issues of this nature based on the cold print of the proceedings in the court below.

[5] The plaintiff had failed to establish whether he knew or not of the voidness of the agreement in order to claim for restitution. At this stage, the loss lies where it fails.

[Appeal allowed.]

Case(s) referred to:
BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd [2000] 2 MLJ 81 ***(refd)***
Kuju Collieries v. Jharkhand Mines AIR [1974] SC 1892 ***(refd)***
Low Ping Ming v. Mbf Finance Bhd [2000] 2 CLJ 307 ***(refd)***
Mbf Leasing Sdn Bhd v. Ban Huat Group Holdings Sdn Bhd & Ors [2000] 1 AMR 329 ***(refd)***
Ng Siew San v. Menaka [1973] 2 MLJ 154 ***(refd)***
Polsky v. S & A Services [1951] 1 All ER 185 ***(refd)***
Public Finance Bhd v. Ehwan Saring [1996] 1 CLJ 628 ***(refd)***
Scott v. Brown, Doering, McNab & Co [1892] QB 724 ***(refd)***
Sivaramakrishnaih v. Narahari Rao AIR [1960] Andh Pra 186 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Contracts Act 1980, s. 24
Sale of Goods Act 1957, ss. 19, 20

For the appellant - Naidu; M/s Naidu & Co
For the respondent - Jagjit Singh; M/s U Harcharan & Kerpal

Reported by Suhainah Wahiduddin

JUDGMENT

PS Gill J:

This is an appeal by the defendant against the decision of the learned sessions court judge at Ipoh in giving judgment against the defendant in the following manner: "That the sums advanced of RM34,150 be returned by the defendant to the plaintiff. That the installments amounting to RM7092 be equally returned to the plaintiff. A sum of RM13,500 for loss of use of vehicle be awarded against the defendant. Interest at the rate of 4% be awarded on the judgment sum of RM54,742 from 5 October 1994".

The case revolves on a sale and purchase, cum hire purchase arrangement of a motor vehicle bearing registration no. WCU3303 involving financing by a finance company.

The action was brought by the plaintiff, claiming that the said vehicle had been seized by the police as it was a stolen vehicle on 5 October 1994. On 9 November 1994, the plaintiff informed the defendant of the said seizure.

For the purpose of this appeal it is convenient to refer to the defendant as the "finance company".

The following facts are not in dispute:

(1) In the purchase of the vehicle, a sum of RM34,150 was paid to one Toon Ah Choy. This is evidenced by a sale purchase agreement dated 7 October 1993. The remaining sum of RM35,000 was financed by the finance company with whom the plaintiff entered into a hire purchase agreement dated 7 October 1993.

2) There is no evidence of any nexus between the Toon Ah Choy and the finance company. Each in independent of the other.

(3) The customer had ceased making any installments when he was unable to renew the road tax of the car, after it was seized by the police.

(4) The fact that vehicle WCU3303 was a stolen vehicle was confirmed by the police investigation dated 16 February 1996.

(5) The plaintiff had terminated the hire purchase agreement on 31 January 1997.

(6) The said Toon Ah Choy has been brought in as a third party in the proceedings, but entered no appearance to it.

In the grounds of judgment, the learned Sessions Court Judge allowed the plaintiff/customer's claim on the ground, that since the finance company had no good title to give the plaintiff due to the fact that the car was stolen, there was a total failure of consideration. Further she held, that there was a fundamental breach of the contract, pursuant to s. 66 Contracts Act 1950, and therefore the entire hire and purchase agreement was null and void. Her reasons were premised entirely on the decision of Mohd Ghazali J in *Public Finance Bhd v. Ehwan Saring* [1996] 1 CLJ 628. For ease of reference I shall reproduce the salient aspect of her decision.

> Perkara yang juga tidak boleh dipertitikkan di sini adalah kereta itu disahkan sebagai kereta curi dan defendan menyedari perkara ini tanpa sebarang keraguan – Lihat Laporan polis D11. Ekoran ini tertakluk atas isu undang-undang pihak defendan tidak ada sebarang "good title" untuk memberi kepada plaintif sebarang masa. Prinsip asas undang yang relevan adalah hanya penjual, seorang yang mempunyai hakmilik yang sah boleh menyerahkan hakmilik yang mempunyai hakmilik yang sah boleh menyerahkan hak milik yang sempurna (good title) kepada seorang pembeli. Mahkamah ingin merujuk kepada kes *Public Finance Bhd v. Ehwan Saring* [1996] 1 CLJ 628 dimana Hakim Mahkamah Tinggi memutuskan – Dengan izin:
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> > Section 7(4) of the Act preserves the implied condition at common law whereby the owner had to have a good title when he entered into the hire purchase agreement, and not when the final payment was made. The phrase "at the time when the property is to pass" in s. 7(i)(b) means at the time when a hirer decides to pay all sums due under a hire-purchase agreement. A breach of s. 7(i)(b) amounts to a breach which goes to the root of the agreement, entitling a hirer to recover the amount already paid by him. The Act does not differentiate between new and second-hand goods as far as ownership is concerned. It also does not provide that the implied condition and warranties under s. 7(2) do not apply to second-hand goods. An implied condition that the owner shall have goods title to pass cannot be excluded from a hire-purchase agreement.
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> Mahkamah juga dapati perjanjian sewa beli yang ditandatangani antara plaintif dan defendan juga dibatal kerana perlanggaran Seksyen 66 Akta Kontrak dan Seksyen 57(2) Akta Kontrak 1950 iaitu

kewujudan "fundamental breach of contract that goes into the root of the contract". Mahkamah telah merujuk kepada kes *PP v. Ehwan bin Saring* [1996] 1 CLJ 628 dan dapati factor-faktor yang sama juga dihuraikan dalam kes itu. Mahkamah dapati bahawa tarikh perjanjian sewabeli ditandatangani adalah tarikh defendant mengatakan mereka adalah "owners of the vehicle". Malangnya mereka didapati "cannot make good such claim, therefore the agreement has now become void". Atas premis ini, mahkamah dapati perjanjian sewabeli ini dibatal.

Central to my deliberations is whether the learned Sessions Court had given enough consideration to the sale and purchase agreement entered into by the plaintiff with Toon Ah Choy prior to the entry of the hire purchase agreement between the finance company and the plaintiff.

From the pleadings, this issue of the sale and purchase agreement entered prior to the hire purchase agreement was not alluded to, though it did emerge in the course of the trial. The said sale and purchase agreement was marked as an exhibit.

In his evidence the plaintiff had in response to a question by the defence counsel said:

Saya setuju sale purchase agreement terlebih dulu kemudian barulah Hire Purchase Agreement.

Documentary evidence:

As regards the documentary evidence, there is evidence of a sale and purchase agreement between Toon Ah Choy and the plaintiff. For ease of reference the said sale and purchase agreement reads as follows:

I, TOON AH CHOY NRIC NO. 5900705 residing at 31, Hala Pegoh Aman 2, Taman Desa Aman, 31500 LAHAT, Ipoh hereby agree to sell my car NISSAN CEFIRO Registration No. WCU 3303 for RM69,150.00 (Ringgit: SIXTY NINE THOUSAND ONE HUNDRED FIFTY ONLY) to KASSIM BIN SHARIFF NRIC No. 3004244 residing at 45, Taman Gopeng Baru, 31600 GOPENG, Perak.

I confirm having received the sum of RM34,150.00 (Ringgit: THIRTY FOUR THOUSAND ONE HUNDRED FIFTY ONLY) from KASSIM BIN SHARIFF as part payment for the sale of my said car mentioned above.

The difference of RM35,000.00 (Ringgit: THIRTY FIVE THOUSAND ONLY) will be paid by M/s Kwong Yik Finance Bhd, 553, Jalan Pasir Puteh, 31650 IPOH Perak as final settlement of the sale of the car stated above.

Signature of Seller
[Sgd]

Signature of Hirer
[Sgd]

There is equally a hire purchase agreement similarly dated on 7 October 1993 between the finance company and the plaintiff.

There is evidence from the plaintiff himself to justify that there existed a sale and purchase agreement of the said vehicle between the vendor and the plaintiff, prior to the creation of the hire purchase agreement. I believe this is not a case where the finance company bought the vehicle by paying the vendor the purchase price in full, and then let it on hire purchase to the plaintiff, but rather a case where the plaintiff having paid the deposit, was unable to settle the balance on his own and had to seek a loan from the finance company to the purchase. The sale purchase agreement categorically states that the sum of RM34,150 was received by the dealer from the plaintiff, and the difference of RM35,000 was to be obtained by financing from Kwong Yik Bank.

It is pertinent to note that the plaintiff has premised his cause of action on the Hire Purchase Act 1967.

The question I must first determine is whether the hire purchase agreement is a true and genuine one. I must admit that these issues were not canvassed before the learned sessions court judge, and thus she had not addressed her mind to it. But these are salient issues which border on void agreements which should be considered despite it not being satisfactorily presented, or developed, in the pleadings and proceedings in the court below.

In deciding the true nature of the transaction, the court is minded to look at both the sale and purchase agreement and the subsequent hire purchase agreement.

In considering whether the transaction is one of loan, it is necessary to look behind the documents to discover its true nature, and if the facts are not truly stated in the documents, there are circumstances, tending to show that the documents were a mere cloak. This is well reflected in *Polsky v. S & A Services* [1951] 1 All ER 185, where Lord Goddard CJ held:

> If the defendant had bought this car from the dealer, all these documents would have been completely in order and no question could have in law and in fact a bill of sale. There are relevant authorities and from them I think that the following proposition can be derived:
>
> (i) if person deliberately, with a clear understanding of what he is doing, and with the appropriate formalities, sells his property to a finance company and then hires it back under a hire purchase agreement, the agreement is not a bill of sale (*Yorkshire Railway Co. v. Maclure*, a decision of the CA; and the *British Railway Traffic & Electric Co. v. Kahu*, a decision of Rowlatt J);

(ii) if the purpose of the transaction was to enable the hirer to dispose of the property to a customer, the court will more readily hold that the agreement is not a bill of sale (*Staffs Motor Guarantee Ltd v. British Wagon Co. Ltd* a decision of Mackennon J);

(iii) if the hire purchase agreement is a mere device to cloak a loan, the document is a bill of sale (*Maclure*'s case per Lindley LJ);

(iv) in considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover its true nature (*Polsky*'s case, a judgment of Lord Goddard CJ, affirmed by the CA);

(v) if the facts are not truly stated in the documents, there is a circumstance tending to show that the documents are a mere cloak (*Polsky*'s case).

See also *Kan Yeow Wing v. Keng Soon Motor Finance Co* [1962] 28 MLJ 391.

Now applying the above principles to the case at hand, the evidence shows that Toon Ah Choy was the initial owner of the vehicle in whose name the vehicle was registered. The finance company was not the owner of the vehicle. The plaintiff had paid a sum of RM34,150 as part payment for the purchase of the said vehicle on 7 October 1993. At that material time the hire purchase agreement was not in existence, that is to say, the vehicle was purchased by the plaintiff, when he paid the part payment of RM34,150 and the vehicle was release or transferred to the plaintiff. The hire purchase agreement, though dated on the same day, was according to the plaintiff signed later, and was for obtaining financing for RM35,000. The hire purchase agreement however makes mention of a deposit of RM34,150 being paid, though no evidence was established as to how this deposit came to be paid by the plaintiff.

It is clear from the evidence available that the plaintiff entered into a contract of sale with Toon Ah Choy and the contract was made allegedly on 7 October 1993. I say allegedly because one is not too sure when the contract was entered into, as the plaintiff had said in evidence, that the sale and purchase agreement was entered into, before the hire purchase agreement was executed by the parties on 7 October 1993.

In my judgment the question that falls to be resolved is when the property had passed. Sections 19 and 20 of the Sale of Goods Act 1957, reads as follows:

i. Where there is a contract for the sale of specific or ascertained goods the property in then is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

ii. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

iii. Unless a different intention appears the rules contained in ss. 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price, or the time of delivery of the goods, or both, is postponed.

The effect of these sections may be summarised thus. In a contract for the sale of specific, or ascertained goods, property in them passes from the seller to the buyer according to the intention of the parties. The intention is to be gathered from the terms of the contract, the conduct of the parties and all the circumstances of the case. In the absence of a contrary intention, property in specific goods passes to the buyer at the time the contract is made, and it matters not whether the parties have postponed either payment for, or the delivery of the goods. [*BSNC Leasing Sdn Bhd v. Sabah Shipyard Sdn Bhd* [2000] 2 MLJ 81], *Mbf Leasing Sdn Bhd v. Ban Huat Group Holdings Sdn Bhd & Ors* [2000] 1 AMR 329, *Low Ping Ming v. Mbf Finance Bhd* [2000] 2 CLJ 307.

The rule expressed in s. 20 of the Sale of Goods Act 1957, therefore applies in full force in this instance. Accordingly the property, the vehicle in question, passed from Toon Ah Choy to the plaintiff, when the contract was made. There is no evidence to show any sale by the plaintiff, or from Toon Ah Choy to the finance company. The ownership in the vehicle therefore remains at all relevant times with the plaintiff. Yet the hire purchase agreement refers to defendant as the owner which is plainly not the truth.

In my judgment, the fair inference to be drawn is that the plaintiff owed Toon Ah Choy the sum of RM35,000 and the hire purchase agreement was used as a device to cloak the real transaction which was a loan upon security of goods. In short, the hire purchase agreement was an unregistered bill of sale. Not being in its statutory form, it was non-registrable and was therefore manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated.

Consequences Of Void Agreements

It is now established that s. 66 Contracts Act 1950, will apply even if the agreement is *void ab initio*, or even if the agreement is void, under s. 24 Contract Act 1980. The crucial test for the application of s. 66 Contracts Act 1950 is whether the parties were aware of the invalidity at the time the contract was made. Only if the parties are unaware can they seek restitution

under s. 66. The law is succinctly stated by the Andh Pradesh High Court in *Sivaramakrishnaih v. Narahari Rao* AIR [1960] Andh Pra 186 which was approved by our Federal Court in *Ng Siew San v. Menaka* [1973] 2 MLJ 154 as follows:

> [ln order to invoke section 65] the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, that is, without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. The effect of section 65 is that, in such a situation, it enables a person not in *pari delicto* to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the *status quo* ante.

It is clear that s. 66 is a restitutionary provision and any remedy granted under the section is not based strictly on contract. The general principle under English Law is that the courts will not enforce, nor grant any remedy, under a void contract. However one of the main exceptions to this rule is that an innocent party may obtain certain remedies, whereares no remedy is available to a guilty party.

I must now proceed to consider whether s. 66 of the Contracts Act 1950 applies. The principle is well illustrated by the case of *Kuju Collieries v. Jharkhand Mines* AIR [1974] SC 1892.

A principal gleaned from that case is to the effect that a contract which is not in accordance with statutory requirements as in the present instance is no contract at all, and therefore cannot be said to have been discovered to be void and unenforceable by either party. It is contaminated by *turpis causa* and that the rule has long been established that *ex turpis causa oritur non action* – no person can claim any right or remedy whatsoever under an illegal transaction in which he had participated. The courts do not overlook the fact that they do not assist a person who comes with unclean hands. In the words of Lindley LJ in *Scott v. Brown, Doering, McNab & Co* [1892] QB 724, on p. 728.

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

Alas on the facts of the present case, there is a paucity of evidence on this issue whether the parties, appellant and respondent were *in pari delicto* or not when the void agreement was entered. This is presumably because these aspects of the case were not satisfactorily presented, and developed in the court below. It is not for me at this juncture to infer issues of this nature based on the cold print of the proceedings in the court below.

In the final analysis the plaintiff/respondent has failed to establish whether he knew or not of the voidness of the agreement in order to claim for restitution, and as such all I can say at this stage is the loss lies where it fails. Thus the appeal of the defendant/appellant is allowed. However the counterclaim of the appellant is dismissed.